No. 83-1738

In the Supreme Court of the United States

OCTOBER TERM, 1983

BEN ADAIR, et.al, and
STATE OF OREGON,

Petitioners,

v.

UNITED STATES OF AMERICA and
KLAMATH INDIAN TRIBE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief of the States of Montana, Arizona, California, Idaho, Nevada, North Dakota, Texas, South Dakota, and Utah, in Support of Petition for Writ of Certiorari, Amici Curiae

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ISSUE

Although the decision below dealt with other issues, this brief is limited to the following question:

Whether under the doctrine of "wise judicial administration" enunciated by this Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the district court below erred in assuming jurisdiction to decide matters pertaining to a general adjudication of water rights pending in state adjudication proceedings.

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INTEREST OF AMICI

The western states named herein as *amici* have established intricate systems to manage and allocate scarce water resources in the arid West. By and large these systems are based upon principles of prior appropriation which protect existing economies based upon established uses. These legal systems are similar to the one in place in Oregon. The stability afforded by western water law has, in large measure, enabled the West to become socially inhabitable and economically productive.

An essential element of virtually every western state system of water allocation is the comprehensive "general water rights adjudication." The general adjudication provides a method whereby water users or state officials can initiate proceedings to obtain a determination of all relative water rights from a particular water source. The only way to assure the effectiveness of the general adjudication is to join all potential claimants, require that each claimant assert all potential claims, and bind all parties by the result. The disregard of the state adjudication proceeding by the district court and the court of appeals vitiates the purpose and effect of the state proceeding and thereby jeopardizes the ability of the state to effectively manage its water resources.

So successful has the West been in managing its water resources that the federal government has continually deferred to state water law. In 1866, by passage of the Mining Act, 14 Stat. 262 (1866), 43 U.S.C. § 661

(1970), Congress stated its intention in this regard by approving past and future appropriations of water on public lands which had been made pursuant to local procedures. Congress acted in similar fashion when it enacted the Desert Land Act of 1877, 19 Stat. 377 (1877), as amended 43 U.S.C. § 383 (1970). This Court recognized that statute as having severed the land and water estates in the western public domain, directing that rights to water be established pursuant to state law, independently of rights to land which could be established under federal law. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

More recently, in *California v. United States*, 438 U.S. 645 (1978), and *United States v. New Mexico*, 438 U.S. 696 (1978), this Court considered carefully "the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *New Mexico*, 438 U.S. at 701-702. The Court held in favor of the state jurisdiction in both instances. Just last term this Court decided three landmark cases recognizing the importance and viability of state systems of water law and the rights created thereunder. *See Arizona v. California*, ___ U.S. ___, 103 S.Ct. 1382 (1983); *Arizona v. San Carlos Apache Tribe*, ___ U.S. ___, 103 S.Ct. 3201 (1983); *Nevada v. United States*, ___ U.S. ___, 103 S.Ct. 2906 (1983).

Particularly important in the instant case is the 1952 congressional enactment of the so-called "McCarran

Amendment," 43 U.S.C.A. § 666 (1964), which provides in part:

> "(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."

The intent of Congress in enacting this statute was to ensure that federally held water rights in the West be subject to determination in state general adjudication proceedings and thereby integrated into state systems of water law. Congress thus intended to promote comprehensive and unitary management of western water rights and avoid piecemeal consideration.

Despite the clear language of the McCarran Amendment the United States continually has sought to avoid it. Initially, the United States sought to exclude its reserved rights from state adjudication proceedings. This Court, in the *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971) and *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971), held that the McCarran Amendment subjected federal reserved rights to general adjudication of water rights in state proceedings, finding that reserved rights were included in those rights where the United States was "otherwise" the owner. (*See* quotation of statute above).

The *Eagle County* decision spoke of Indian and non-Indian reserved water rights without any suggestion that there was a distinction between them for purposes of the McCarran Amendment. Notwithstanding, after *Eagle County* the United States insisted that Indian reserved water rights were not covered under the purview of the McCarran Amendment. In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) this Court held that the McCarran Amendment provides state courts with jurisdiction to adjudicate Indian reserved water rights. This Court further held that, in light of the clear federal policies underlying the McCarran Amendment, a water rights suit brought by the United States in federal court should be dismissed in favor of a concurrent comprehensive state adjudication proceeding addressing the same issues.

Even after the *Colorado River* decision, the United States and Indian tribes asserted that the *Colorado River* rule should not obtain where Indian tribes themselves initiate federal court proceedings to determine their water rights or where those rights are located in so-called "disclaimer" states, *Arizona v. San Carlos Apache Tribe*, ___ U.S. ___, 103 S.Ct. 3201 (1983). Again a case involving the meaning of the McCarran Amendment had to be decided by this Court and once again, this Court emphasized that the McCarran Amendment subjects Indian reserved water rights to determination in state adjudication proceedings, regardless of other apparent limitations in

federal law or policy, and that concurrent federal proceedings should be dismissed in favor of state adjudication proceedings.

Despite these repeated directions from this Court, the United States and the Indian tribe, in the case below, have attempted to carve out another exception from the ruling laid down in *Colorado River*; namely, that states have jurisdiction to determine Indian water rights in state adjudication proceedings and that federal proceedings should be dismissed if they address the same issues involved in pending state adjudication proceedings. In ruling in favor of the United States and the Indian tribe on this matter, the district court attempted to distinguish *Colorado River* stating "the factual basis of the *Colorado River* case is not present here because of the limited jurisdiction of the state and because of other differences." *See* Slip Opinion at 50, footnote 6). Readers of the opinion are left to wonder in what respect Oregon's jurisdiction is limited. The "other differences" referred to apparently are what the appeals court characterized as the nascent nature of the state adjudication proceedings, which had "not moved forward" during the circuit court's deliberations in the case, and which were, according to the court, "stayed during pendency of the federal suit." (Slip Opinion at 15.) These statements demonstrate two things. First, that both the Ninth Circuit and the district court apparently lacked understanding of the complexity of the general adjudication process, and second that the courts,

in reaching their decisions, relied upon incorrect information regarding the status of the state adjudication proceedings. It is clear that the state proceedings did move forward while the federal suit was pending. Oregon expended substantial sums in this regard, completing surveys and other field work essential to the adjudication process. *See* Affidavit of Chris Wheeler, Deputy Director of the Oregon Department of Water Resources (Appended to Appellant's Petition for Rehearing before the Ninth Circuit Court of Appeals, November 30, 1983.)

The *amici* states are concerned by the Ninth Circuit's decision because of its departure from the precedent set by the decisions of this Court. Further, the *amici* submit that the decision below encourages the piecemeal, duplicative, and wasteful litigation the McCarran Amendment is designed to avoid. The decision stands for the "generation of additional litigation through permitting inconsistent dispositions of property." *San Carlos*, 103 S.Ct. at 3206 (quoting *Colorado River*, 424 U.S. at 819), which this Court has so carefully sought to eradicate. The decision runs contrary to congressional policy, as evidenced by the McCarran Amendment, of facilitating the general adjudication process and thereby bringing finality and certainty to western water rights. As a result, the *amici* urge this Court to grant Oregon's petition for writ of certiorari to review the decision below of the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of this Court and is adverse to the interest of sound public policy.

A. The decision below conflicts with the decisions of this Court.

The McCarran Amendment, 43 U.S.C.A. § 666 (1964), was enacted in 1952 to make possible joinder of the United States in comprehensive state water right adjudication proceedings. As previously noted, the historical position of the United States has been to resist the application of the statute to federal reserved rights, especially to Indian reserved water rights.

Responding to this position, the Court in *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971), and *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971) examined the provisions of the McCarran Amendment, whereby "consent is given to join the United States as a defendant in any suit (1) for the adjudication . . . or (2) administration of [water] rights, where it appears the United States is the owner . . . by appropriation under state law, by purchase, by exchange or otherwise." The Court concluded that the statute subjected federal reserved rights to general adjudication in state proceedings for the determination of water rights. Specifically, this Court held that reserved water rights were included in those rights where

the United States was "otherwise" the owner, *Eagle County*, 401 U.S. at 524.

After *Eagle County* was decided, the United States and various Indian tribes continued to argue that the term "federal reserved rights" did not necessarily include Indian reserved rights. In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), this Court responded by stating that "not only the amendment's language, but also its underlying policy, dictate a construction including Indian rights in its provisions." *Colorado River*, 424 U.S. at 810. This Court stated further:

> "Mere subjection of Indian rights to legal challenge in state court, . . . would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the Amendment, would eventually be necessitated to resolve conflicting claims to this scarce resource."

Colorado River, 424 U.S. at 812. In considering the existence of concurrent federal proceedings this Court went on to hold that, while the case fell within none of the formally established categories of the "abstention" doctrine, principles of "wise judicial administration" required that the concurrent federal litigation be dismissed in favor of state adjudication proceedings addressing the same issues. This Court concluded that "a number of factors clearly counsel against concurrent federal proceedings," *Colorado River*, 424 U.S. at 819, and then defined the factors as follows:

> "The most important of these is the McCarran Amendment itself. The clear federal policy evinced

> by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. . . . [W]e have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. *See Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440 (1916).
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> ". . . .
>
> "Beyond the congressional policy expressed by the McCarran Amendment and consistent with furtherance of that policy, we also find significant (a) the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motions to dismiss, (b) the extensive involvement of state water rights occasioned by this suit naming 1,000 defendants, (c) the 300 miles distance between the District Court in Denver and the court in Division 7, and (d) the existing participation by the Government in Division 4, 5, and 6 proceedings [footnote omitted]."

Colorado River, 424 U.S. at 819, 820.

After this Court's decision in *Colorado River*, federal and Indian attorneys sought to distinguish the case and its holding from similar situations. *Arizona v. San Carlos Apache Tribe*, ___ U.S. ___, 103 S.Ct. 3201 (1983), provided this Court another opportunity to emphasize that:

> "[T]he most important consideration in *Colorado River*, and *the most important consideration in any federal water suit concurrent to a comprehensive state proceeding*, must be the 'policy underlying the McCarran Amendment,' [citations omitted], and, despite the strong arguments raised by the respondents, we cannot conclude that water right suits brought by Indians and seeking adjudication only of Indian rights should be excepted from the application of that policy or from the general principles set out in *Colorado River*."

San Carlos, 103 S.Ct. at 3215 (emphasis added).

The results of this Court's decisions can thus be summarized as follows. First, the McCarran Amendment subjects Indian reserved water rights to adjudication in state adjudication proceedings. Second, concurrent federal litigation aimed at determining issues which are to be decided in a state adjudication proceeding should generally be dismissed under the doctrine of wise judicial administration. Third, the most important factor when considering such dismissal is the underlying policy of the McCarran Amendment, which is to avoid duplicative and wasteful litigation. Fourth, other factors to be taken into account when considering such dismissal are: (a) the status of the federal proceedings when a motion to dismiss them is made, (b) the involvement of state water rights occasioned by the state proceedings, (c) convenience of forums, and (d) participation by the federal government in other water right proceedings in the state.

In considering the application of the *Colorado River* principles to the present case, the following facts are pertinent. First, the State of Oregon has jurisdiction to adjudicate Indian reserved water rights in its general adjudication proceedings (for a discussion of the comprehensive nature of these proceedings, *see Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440, 448, 451 (1916)). Second, the federal litigation below was aimed at adjudication of a small portion of a river system completely included within a larger area covered by the state proceeding. The issues to be determined in the federal proceedings, therefore, would be decided in the state pro-

ceedings. Third, the federal proceeding was not binding on any downstream water users not participating in the suit (Pretrial Order, paragraph 2, p. 3.). These parties, therefore, could relitigate the same questions decided by the federal court. This violates the primary policy underlying the McCarran Amendment of avoiding duplicative and wasteful litigation.

Other factors found significant in *Colorado River* also counsel in favor of dismissal of the federal court proceeding below: (a) when the motion to dismiss the federal court litigation was made, no meaningful deliberations had occurred in the federal court (both the state and federal proceedings were in their infancy); (b) significant involvement of state water rights existed in the state adjudication proceeding; (c) the federal district court is 279 miles from the Klamath County administrative forum, and (4) the federal government had a history of participating in state water proceedings in Oregon with some 4,000 state filings to date. Thus, consideration of the factors of *Colorado River* clearly indicates that the motion to dismiss the federal proceedings below should have been granted. In ruling to the contrary, both the district court and the Ninth Circuit Court of Appeals were in error.

B. The decision below is adverse to the interests of sound public policy.

The implications of the Ninth Circuit's ruling in this case could reach well beyond the specific adjudication proceeding involved below. The case represents a depar-

ture from the principles laid down by this Court in *Colorado River* and would thus encourage the wasteful and duplicative litigation which Congress and this Court, for so many years, have sought to avoid.

Of particular concern to the *amici* states is the standard of review employed by the Ninth Circuit in affirming the district court's exercise of jurisdiction. At one point, the Ninth Circuit stated:

> "In the present case, therefore, we will not set aside the district court's decision to exercise its jurisdiction unless we have a definite and firm conviction that the district court committed a clear error of judgment in concluding that exceptional circumstances requiring dismissal were not presented."

Slip opinion at 12. In justifying its decision to uphold the exercise of jurisdiction, the court went on to state that if it were to "erase the district court's careful and time-consuming consideration of . . . this suit" it would, "in effect 'throw the baby out with the bath' " Slip opinion at 13. The court then criticized the state proceedings, describing them as having been "stayed" during the pendency of the federal suit. Slip opinion at 14, 15.

It should first be pointed out that the facts in the present situation are, as demonstrated above, substantially identical to those in *Colorado River*, thus providing the criteria which require dismissal of a federal water right suit in the face of concurrent state proceedings. To require "exceptional circumstances" beyond those specified by this Court is to misapply the *Colorado River* standard.

Second, the *Colorado River* decision requires comparison of state and federal water proceedings at the time a motion to dismiss is filed, not several years later when a case is being considered by an appeals court. Furthermore, the pretrial order in the federal suit below states that non-parties are not bound by the result. These non-parties can argue they have the right to relitigate the legal questions decided by the federal court. There is, therefore, little validity to the claim that overturning the district court's decision against dismissal of the federal proceeding amounts to "throwing the baby out with the bath" since the issues decided by the district court are liable to be relitigated in any case.

Third, there is simply no truth to the idea that the state adjudication proceeding was "stayed" during pendency of the federal suit. The affidavit filed by the Deputy Director of the Oregon Department of Water Resources in support of the Petition for Rehearing before the Ninth Circuit states that Oregon had spent over $900,000 on the state adjudication proceeding and completed 60-65% of the field work pertaining to the use of water for which notices of intent to file claims had been submitted. Additionally, the state had surveyed 180,000 acres of developed irrigated land in the Klamath Basin, half of which was in the Klamath project, and expected to spend another $150,000 in 1984 alone. *See* Affidavit of Chris Wheeler, *supra*.

Because of the number of parties and nature of the property interests involved in adjudication proceedings,

such proceedings are lengthy and complex. Realizing this, Congress sought to expedite these proceedings by enacting the McCarran Amendment. This Court has interpreted the law consistant with this objective. To depart from this interpretation not only makes the process more complex and burdensome, but also injects into general adjudication proceedings the difficulties occasioned by duplicative, needless and piecemeal judicial actions. The *amici* states submit that such a result is adverse to the interests of sound public policy and urge this Court to grant a petition for writ of certiorari to review the Ninth Circuit's decision blow.

CONCLUSION

In the decision below the Ninth Circuit disregarded the intent of Congress as well as the principles established in numerous decisions by this Court. The decision encourages duplicative and piecemeal litigation. It will hinder rather than facilitate the comprehensive determination of relative water rights through general adjudication proceedings. The decision sanctions a method of dispute resolution which this Court has repeatedly found to be unwise. Because of these implications, the *amici* states urge this Court to grant the petition for writ of certiorari and to reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

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